

IN THE MATTER OF THE CLAIM	* BEFORE ROBERT F. BARRY,
OF JESSE CERDA,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANT	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	*
FOR THE ALLEGED ACTS OR	*
OMISSIONS OF	*
KIMBERLY KAGEN,	* OAH No.: LABOR-HIC-02-23-06666
TRADING AS PHOENIX	* MHIC No.: 22 (75) 1015
REMODELING GROUP, LLC,	*
RESPONDENT	*

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On July 18, 2022, Jesse Cerda (Claimant) filed a claim with the Maryland Home Improvement Commission (Commission) against the Home Improvement Guaranty Fund (Guaranty Fund or FUND) for compensation of \$18,737.25 for an actual loss resulting from an act or omission by a licensed home-improvement contractor, Kimberly Kagen, trading as

Phoenix Remodeling Group, LLC (Respondent). Md. Code Ann., Bus. Reg. §§ 8-405(a) (Supp. 2022), 8-406 (2015).¹

On February 3, 2023, the Commission issued a Hearing Order. On February 14, 2023, the Commission transmitted the case to the Office of Administrative Hearings (OAH). Bus. Reg. § 8-407(c)(2)(i).

On May 26, 2023, I held a hearing at the OAH in Hunt Valley, Maryland. *Id.* Attorney Nicholas R. McDaniels represented the Claimant. The Respondent did not appear. Hope Miller Sachs, Assistant Attorney General, Department of Labor (Department), represented the Guaranty Fund.

The contested-case provisions of the Administrative Procedure Act; the Department's and the Commission's hearing regulations; and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); Code of Maryland Regulations (COMAR) 09.01.03, COMAR 09.08.02.01B, and COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss due to the Respondent's abandonment of a home improvement contract?
2. If so, what, if any, compensation may the Claimant recover from the Guaranty Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted four exhibits into evidence for the Claimant:

CLAIM. #1 - Estimate of Repairs, ALLCAT, date of inspection:
November 20, 2020

¹ All references to section 8-405 of the Business Regulation Article are to the 2022 Supplement. All other references to the Business Regulation Article are to the 2015 Replacement Volume.

CLAIM. #2 - Check for \$18,737.25 from USAA General Indemnity Company to the Claimant, his wife, and Home Point Financial, January 22, 2021

CLAIM. #3 - Home Improvement Contract between the Claimant and the Respondent, December 2, 2020

CLAIM. #4 - Letter from Richard J. Hackerman, striking his appearance as Respondent's attorney, May 11, 2023

I admitted seven exhibits into evidence for the Guaranty Fund:

FUND #1 - Notice of Hearing, issued April 7, 2023; with Hearing Order, issued February 3, 2023

FUND #2 - Commission Licensing History for the Respondent, April 25, 2023

FUND #3 - Notice of Hearing, issued May 5, 2023

FUND #4 - Respondent's Driving Record Information, Motor Vehicle Administration

FUND #5 - Undeliverable Certified Mail (Notice of Hearing, issued April 7, 2023)

FUND #6 - Undeliverable First-Class Mail (Notice of Hearing, issued April 7, 2023)

FUND #7 - Undeliverable Certified Mail (Notice of Hearing, issued May 5, 2023)

Testimony

The Claimant testified.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. The Commission licensed the Respondent as an individual home improvement contractor under registration number 01-116244 from June 26, 2018, through May 3, 2022, when the Commission suspended the Respondent's license for failing to perform home improvement contracts. The Respondent's license expired on June 26, 2022.

2. The Respondent traded as Phoenix Remodeling Group, LLC, which the Commission licensed as a corporate home improvement contractor under registration number 05-135908.

3. The Claimant owns a home on Beaverbank Circle in Towson.

4. On or about August 31, 2020, a storm damaged the roof and siding of the Claimant's home, causing the roof to leak, with water penetrating the interior of the Claimant's home.

5. On November 12, 2020, the Claimant filed a claim with USAA General Indemnity Company (USAA) under his homeowner's insurance policy.

6. USAA determined that the damage to the Claimant's home was covered under the homeowner's insurance policy and estimated the cost of repairs as \$31,129.21, with \$9,622.52 of recoverable depreciation. The Claimant's homeowner's policy had a \$2,000.00 deductible.

7. On December 2, 2020, the Claimant and the Respondent agreed that the Respondent would replace the roof, gutters, and downspouts on the Claimant's home for \$30,359.77, with a deposit of \$18,737.25 to be collected when the Claimant received that amount from USAA under his homeowner's insurance policy.

8. On January 22, 2021, USAA issued a check for \$18,737.25 to the Claimant, his wife, and Home Point Financial, the mortgagee on the Claimant's home.

9. The Claimant and his wife endorsed the check over to the Respondent.

10. The Respondent did not perform any work at the Claimant's home; nor did the Respondent refund any part of the Claimant's deposit.

11. Two of the Respondent's employees, a salesman named Drew and a project manager named Rocky, initially indicated that they were having difficulty getting supplies, then

blamed the Respondent for the delay, and finally, in July 2021, conceded that nothing was going to be done on the Claimant's home improvement contract.

12. On April 7, 2023, the OAH sent a Notice of Hearing to the Respondent by first-class and certified mail at the business address on record with the Commission.

13. On April 19, 2023, the United States Postal Service (USPS) returned the first-class and certified mail, with a notation "attempted – not known."

14. On May 5, 2023, the OAH sent a Notice of Hearing by first-class mail to the Respondent at her MVA address and to her attorney, Richard J. Hackerman.

15. On May 5, 2023, the OAH sent a Notice of Hearing to the Respondent by certified mail at a slightly incorrect version of her MVA address (Ohan Court instead of Rohan Court).

16. The USPS did not return to the OAH the first-class mailings sent on May 5, 2023, to the Respondent and Mr. Hackerman.

17. The USPS returned to the OAH as "not deliverable as addressed" the certified mailing sent to the Respondent on May 5, 2023.

18. On May 11, 2023, Mr. Hackerman struck his appearance in this case.

DISCUSSION

The Respondent's Notice of Hearing

The procedures for notice and hearings for disciplinary actions against home-improvement contractors also apply to proceedings to recover compensation from the Guaranty Fund. Bus. Reg. § 8-407(a). Section 8-312 of the Business Regulation Article requires the Commission to give the person against whom disciplinary action is contemplated an opportunity for a hearing. Bus. Reg. § 8-312(a). The Commission is required to send a hearing notice to the person against whom

disciplinary action is contemplated at least ten days before the hearing by certified mail to the business address on record with the Commission. *Id.* § 8-312(d). If, after due notice, the person against whom disciplinary action is contemplated does not appear, the Commission (or by delegation the OAH) “may hear and determine the matter.” *Id.* § 8-312(h).

On April 7, 2023, the OAH sent a Notice of Hearing to the Respondent by first-class and certified mail at the business address on record with the Commission. On April 19, 2023, the USPS returned the first-class and certified mail, with a notation “attempted – not known.” On May 5, 2023, the OAH sent a Notice of Hearing by first-class mail to the Respondent at her MVA address and to her attorney, Richard J. Hackerman. On May 5, 2023, the OAH sent a Notice of Hearing to the Respondent by certified mail at a slightly incorrect version of her MVA address (Ohan Court instead of Rohan Court). The USPS returned to the OAH as “not deliverable as addressed” the certified mailing to the Respondent on May 5, 2023. The USPS did not return to the OAH the first-class mailings sent on May 5, 2023, to the Respondent and Mr. Hackerman. On May 11, 2023, Mr. Hackerman struck his appearance in this case.

On this record, I conclude that the Respondent had actual notice of the hearing. The USPS did not return to the OAH the first-class mailings sent to the Respondent and Mr. Hackerman on May 5, 2023. I am confident that Mr. Hackerman would have informed his client of the hearing date in this case before striking his appearance. I am satisfied that the Respondent had proper notice of the hearing by first-class mail and through her attorney. It is appropriate for me to determine the merits of this claim against the Guaranty Fund even in the Respondent’s absence.

Guaranty Fund Claim

A homeowner “may recover compensation from the Guaranty Fund for an actual loss that results from an act or omission by a licensed contractor.” Bus. Reg. § 8-405(a). An “actual loss’ means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” *Id.* § 8-401. The Commission may not award from the Guaranty Fund an amount for consequential damages, which are losses that result indirectly from any unworkmanlike, inadequate, or incomplete home improvement. Bus. Reg. § 8-405(e)(3). The Commission may deny a claim if it finds that “the claimant unreasonably rejected good-faith efforts by the contractor to resolve the claim.” *Id.* § 8-405(d).

A claimant has the burden of proof at a Guaranty Fund hearing. Bus. Reg. § 8-407(e)(1). In the circumstances presented here, the Claimant has the burden to establish that: (1) the Respondent performed an incomplete home improvement; (2) the Claimant had an actual loss due to the costs of completing the home improvement; and (3) the Claimant did not unreasonably reject the Respondent’s good-faith efforts to resolve the claim.

The Claimant proved his eligibility for compensation. The Claimant paid the Respondent a deposit of \$18,737.25 to repair the roof and siding on the Claimant’s home. The Respondent performed no work on the home improvement contract and did not refund any part of the deposit to then Claimant. The Guaranty Fund conceded that the Claimant was entitled to compensation.

Actual loss

COMAR 09.08.03.03B, which governs the calculation of awards from the Guaranty Fund, provides, in pertinent part, as follows:

B. Measure of Awards from Guaranty Fund.

...

(2) The Fund may only compensate claimants for actual losses they incurred as a result of misconduct by a licensed contractor.

(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

(a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.

....

The Claimant's actual loss is the \$18,737.25 he paid to the Respondent.

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss of \$18,737.25 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015 & Supp. 2022); COMAR 09.08.03.03B(3)(a). I further conclude that the Claimant is entitled to compensation in that amount from the Guaranty Fund. Md. Code Ann., Bus. Reg. § 8-405(a) (Supp. 2022); COMAR 09.08.03.03B(3)(a).

RECOMMENDED ORDER

I **RECOMMEND** that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$18,737.25; and

ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission; and

ORDER that the records and publications of the Maryland Home Improvement Commission reflect this decision.

July 11, 2023
Date Decision Issued

RFB/dlm
205368

Robert F. Barry

Robert F. Barry
Administrative Law Judge

PROPOSED ORDER

WHEREFORE, this 21st day of August, 2023, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Michael Newton

Michael Newton

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***